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Supreme Court of the United States

October Term, 1923—No. 361

THE BANCO MEXICANO DE COMMERIO E INDUSTRIA and ELIAS S. A. DE LIMA, FRANCISCO DE P. CARDONA, and EDWIN J. PARKINSON, as Liquidators of said Banco Mexicano de Comercio e Industria,

Appellants-Petitioners,

against

DEUTSCHE BANK, a Corporation; THOMAS W. MILLER, Alien Property Custodian, and FRANK WHITE, Treasurer of the United States,

Appellees-Respondents.

ON APPEAL FROM, AND ON PETITION FOR CERTIORARI TO, THE
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS-PETITIONERS

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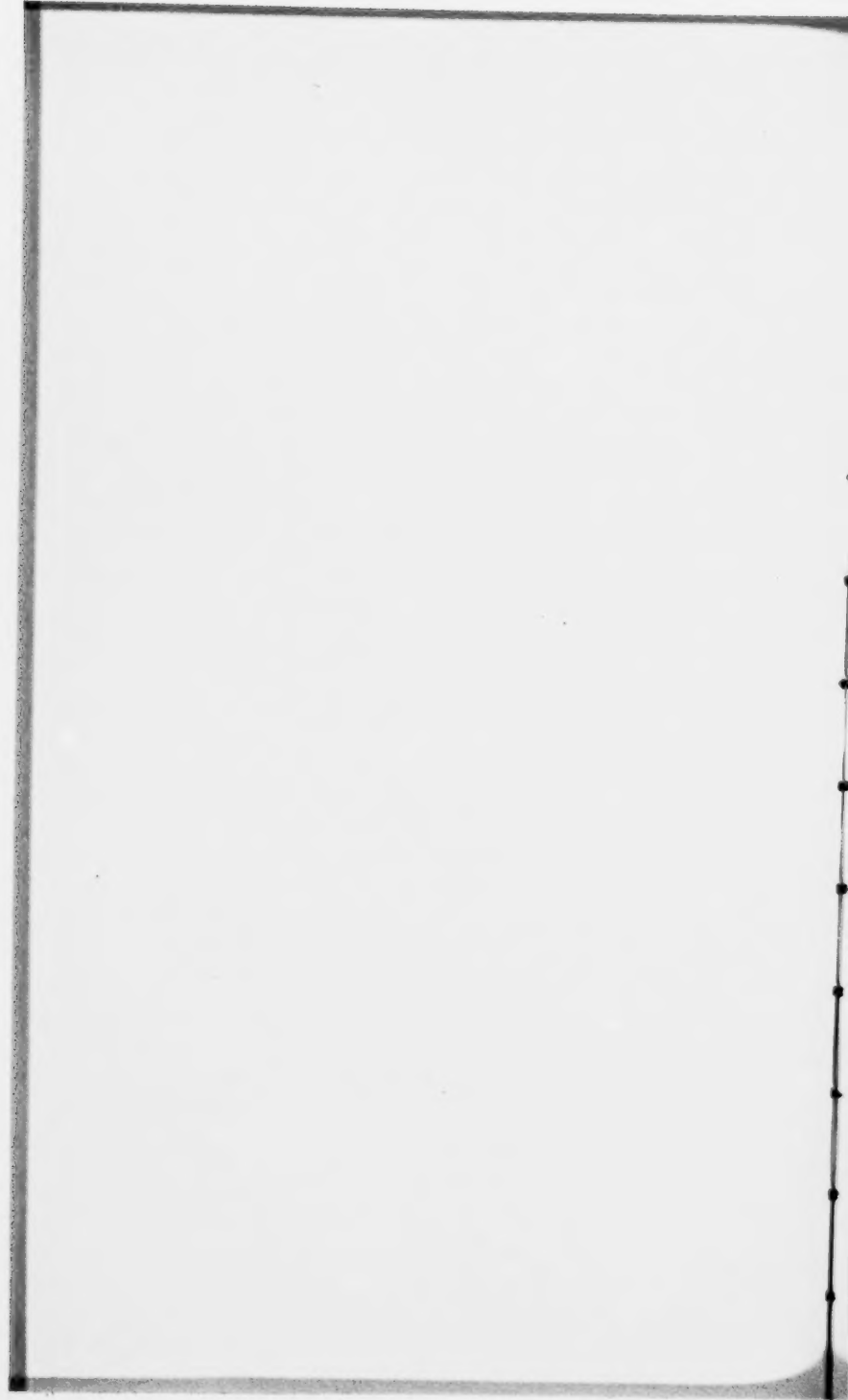
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CERTIORARI FOR THE REVIEW OF, A FINAL DECREE OF THE
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA
AFFIRMING A FINAL DECREE OF THE SUPREME COURT OF
THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS-PETITIONERS.

Statement of the Manner in Which The Case Comes Into This Court.

This case is brought here upon an appeal, under
Section 250 of the Judicial Code (36 Stat., 1159), and
particularly under subdivision 5 of that Section, from
a final decree of the Court of Appeals of the District

of Columbia,* made and entered on the 7th day of May, 1923, dismissing with costs the Bill of Complaint. The appeal was allowed by the Court of Appeals on May 26, 1923 (Rec., p. 97). It is based upon the fact that the case is one "in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question" (Jud. Code, §250, subdivision 5). The question involved is the scope of the power and duty of the Alien Property Custodian under sub-sections (a) and (e) of Section 9 of the Trading with the Enemy Act (41 Stat., 977), and particularly whether he should be directed to pay to the plaintiffs out of seized property in his hands belonging to the defendant Deutsche Bank, an alien enemy, a debt owing by it to the plaintiffs, who are friendly aliens.

The appeal also lies under subdivision 6 of Section 250 of the Judicial Code, providing that an appeal may be taken "in cases in which the construction of any law of the United States is drawn in question by the defendant." For the cause of action set forth in the Bill of Complaint is based upon a construction of Section 9, sub-sections (a) and (e) of the Trading with the Enemy Act, which was drawn in question by the defendants, the Alien Property Custodian and the Treasurer of the United States, in moving to dismiss the Bill of Complaint. See *Payne v. Central Pacific Ry. Co.*, 255 U. S., 228.

The appellants on June 28, 1923, upon the advice of counsel and out of greater caution, and upon

*Opinion reported in 289 Fed., 924.

the certificate of counsel that the true scope and intent of Section 250 of the Judicial Code under which the appeal had been allowed, was doubtful, filed a petition with this court for a writ of *certiorari* to review the decision of the Court of Appeals of the District of Columbia, praying in the alternative, either (1) that a writ of *certiorari* be issued to the Court of Appeals for the purpose of reviewing in this court, under the provisions of Section 251 of the Judicial Code, the final decree of that court, or (2) that consideration of the petition be deferred until the hearing on the appeal.

This court, on October 8, 1923, postponed action upon the petition until the consideration of the case on the appeal so that it and the application for the writ of *certiorari* might be heard together. If the court shall decide that an appeal does not lie, we ask on the grounds stated in the petition and the brief submitted in support thereof that a writ of *certiorari* be issued, and that thereon and upon the record heretofore certified and filed herein, the final decree of the Court of Appeals be reversed.

The Cause of Action.

The plaintiffs-appellants brought their bill in equity under Section 9, sub-section (a) of the Trading with the Enemy Act: "An Act To amend section 9 of an Act entitled 'An Act to define, regulate, and punish trading with the enemy, and for other purposes,' approved October 6, 1917, as amended," approved June 5, 1920 (41 Stat. 977). The specific

question involved is to what extent and in what manner the right of a friendly alien under sub-section (a) to collect a debt out of money or property of an alien enemy in the hands of the Custodian, is limited by the provision of sub-section (e) that such debt must have arisen "with reference to" such money or property.

For convenience of reference we here set forth pertinent portions of Section 9 as amended:

"SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit

at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, *said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed*, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the court shall determine said claimant is entitled.
 * * * ” (Italics ours.)

Sub-sections (b), (c) and (d) of Section 9 provide for cases with which we are not concerned upon this appeal. Sub-section (e) contains the limitation upon the power and duty of the Alien Property Custodian, the meaning of which is the principal question involved upon this appeal. That sub-section provides as follows, viz:

“(e) No money or other property shall be returned nor any debt allowed under this section

to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and *as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.*" (Italics ours.)

Sub-section (f), which, argumentatively, has much significance, is as follows:

"(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

The appellant, the Banco Mexicano de Comercio e Industria, is a corporation organized under the laws of the Republic of Mexico to conduct a banking business. The individual appellants are its liquidators. (Bill of Complaint, paragraphs 3 and 4; Rec., p. 3). At the time of the transaction on which the suit is based the Banco Mexicano had no office in this country, its principal place of business being the City of Mexico (Bill of Complaint, par. 4; Rec., p. 3). But the Deutsche Bank then and for some time theretofore maintained an office for the transaction of the

banking business in the City of New York (Rec., p. 4).

On or about December 15, 1916, the individual appellants, as liquidators of the Banco Mexicano, made in New York City a loan to the Deutsche Bank of \$500,000 in gold, which was by its terms payable in New York City in gold dollars on June 15, 1917, with interest at the rate of 5 per cent. per annum (Bill, par. 5; Rec., p. 4). After the loan was made its proceeds "were never transferred from the United States physically or otherwise, but constituted a part of the balance of the general deposits and securities and other property in the United States of the Deutsche Bank which were taken over and seized by the then Alien Property Custodian" (Bill, par. 7; Rec., p. 4). Some time after the declaration of war between the United States and Germany and after the passage of the Trading with the Enemy Act, the money and property of the Deutsche Bank in the United States were turned over to or seized by the Alien Property Custodian and have ever since been held by him (Bill, par. 6; Rec., p. 4). From the time when the loan was made and until the property of the Deutsche Bank came into the custody of the Alien Property Custodian, that corporation "continuously kept in the United States sufficient funds and property over and above what was necessary to pay and discharge all other claims and debts of every kind, to repay said loan in American gold dollars with interest at the rate of 5% from December 15, 1916" (Bill, par. 8; Rec., p. 4). It is further

alleged in the Bill of Complaint that the "Deutsche Bank would, in the ordinary and usual course of business which it was then carrying on in this country and particularly in the City of New York, have so repaid the same [*i. e.*, the loan] when the debt fell due, if war had not intervened between the United States and Germany" (Bill, par. 8; Rec., p. 4).

The allegation is made in the Bill of Complaint and is admitted in the answer of the Deutsche Bank (Rec., p. 9) that the funds and property taken over by the Alien Property Custodian "were kept in the United States for the express purpose and with the intention by the use thereof, of repaying the said loan when the same fell due" (Bill, par. 8; Rec., p. 4).

On May 27, 1920, the individual appellants, as liquidators, filed a claim and demand with the Alien Property Custodian and made an application to the President of the United States, for the payment of the debt of the Deutsche Bank, as required by the provisions of the Trading with the Enemy Act. The claim and application having been denied (Bill, pars. 9, 10 and 11; Rec., p. 5), this suit was brought under the provisions of Section 9, sub-sec. (a) of the Act for the recovery of the amount of the debt with interest at the rate of 5 per cent. to the date of maturity, and thereafter at the rate of 6 per cent. The Deutsche Bank on June 5, 1920, filed with the Alien Property Custodian a consent that the claim of the appellants should be allowed and that the debt with interest should be paid "out of the funds and such

other securities seized by the Custodian as formerly belonged to the Deutsche Bank, and were held by said Custodian or by the Treasurer of the United States" (Bill, par. 13; Rec., p. 5). The Alien Property Custodian and the Treasurer of the United States held sufficient cash and marketable securities formerly belonging to the Deutsche Bank, over and above all claims against the same, to discharge the debt owing to the Banco Mexicano or its liquidators, with interest (Bill, par. 14; Rec., p. 6).

It is further alleged in the Bill of Complaint that if it had not been for the delivery of the property of the Deutsche Bank to the Alien Property Custodian under the provisions of the Trading with the Enemy Act, the courts of New York State, where the transaction had originated and where the loan was to be repaid, would have had jurisdiction of the parties so that a suit could have been brought there by the Banco Mexicano or its liquidators against the Deutsche Bank for the recovery of the debt and interest; and furthermore, that the property and funds of the Deutsche Bank could have been attached in such a suit and could have been held as security for and applied to the satisfaction of a judgment against the Deutsche Bank when obtained (Bill, par. 16, Rec., p. 6).

Upon the foregoing facts the Bill of Complaint prayed that the Alien Property Custodian or the Treasurer of the United States pay to the appellants \$500,000 with the interest above specified.

Motion to Dismiss.

The Alien Property Custodian and the Treasurer of the United States appeared by the Attorney of the United States in and for the District of Columbia and moved to dismiss the bill of complaint upon the ground "that the debt which the plaintiffs are seeking to recover did not arise with reference to any money or other property held by the Alien Property Custodian or the Treasurer of the United States under and pursuant to the terms and provisions of the Trading with the Enemy Act, as amended," and further upon the general ground "that the plaintiffs herein have not set forth facts sufficient to entitle them to equitable relief under Section 9 of the Trading with the Enemy Act as amended" (Rec., p. 8).

It is assumed in this brief that the second ground of the motion is merely a corollary of the first and that the sole basis for the motion to dismiss rests upon the proper interpretation of that part of sub-section (e) of Section 9, which provides that a debt "as to claimants other than citizens of the United States" may not be allowed by the Alien Property Custodian or the President of the United States under the provisions of sub-section (a) of the same section "unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder." The Government denied the right of the appellants to collect the debt incurred under the circumstances outlined above, and it is the denial of that right that makes the issue in this suit. The motion to dismiss

is in the nature of a demurrer and the material facts alleged in the Bill of Complaint are to be taken as true. (Equity Rule 32 of the Supreme Court of the District of Columbia; Gibson's Suits in Chancery, Sec. 310; Hopkins' Fed. Eq. Rules (3rd Ed., 1922, p. 187); *Stromberg Motor Devices Co. v. Holley Bros. Co.*, 260 Fed. Rep., 220.)

The Proceedings Upon the Motion to Dismiss.

The cause was brought on for trial before the Supreme Court of the District of Columbia upon the Bill of Complaint (Rec., p. 2), the answer of the defendant Deutsche Bank (Rec., p. 9) and the motion to dismiss the Bill of Complaint (Rec., p. 8). The motion to dismiss was granted and from the decree entered thereon the plaintiffs appealed to the Court of Appeals of the District of Columbia (Rec., p. 86).

Upon the argument of the motion to dismiss, there were received by the court without objection on the part of any of the defendants, and there became a part of the record herein, certified copies of (1) the record of a hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives, Sixty-sixth Congress, Second Session, on H. R. 14208 (Rec., pp. 11-75), and (2) report No. 1089 of the Committee on Interstate and Foreign Commerce of the House of Representatives, to accompany H. R. 14208 (Rec., pp. 75-85).

The former report derives its special value from the statement it contains of the Assistant Attorney

General who drafted the bill afterwards enacted into law on June 5, 1920. In illustrating the scope and meaning of the provision which became sub-section (c) of Section 9, he stated that its purpose was to keep out claims of non-American origin. His illustrations (Rec., p. 31) of claims which were intended to be allowed under the Act included a case almost identical in its essential features with the case at bar. The report is discussed in sub-point G, *post*, pages 34 *et seq.*

Assignments of Error.

These are set forth at pages 95 and 96 of the record, and no assignment of error has been abandoned. The first assignment is as follows:

“1. The Court erred in holding in effect that it did not appear from the facts alleged in the bill of complaint herein that the debt which the plaintiffs-appellants are seeking to recover arose with reference to moneys or other property held by the Alien Property Custodian or the Treasurer of the United States under the provisions of and within the meaning and intent of ‘An Act to Define, Regulate and Punish Trading with the Enemy, and for Other Purposes, Approved October 6, 1917,’ as amended by an Act of Congress to Amend Section 9 of said Act, which amending Act was approved June 5, 1920, and commonly known and hereinafter referred to as the ‘Trading with the Enemy Act.’ ”

This assignment in general terms raises the entire question involved upon this appeal. The second assignment is as follows:

"2. The Court erred in holding in effect that it should have been, but was not, shown in the bill of complaint that some specific legal relation existed between the debt which the plaintiffs-appellants are seeking to recover and the money held by the Alien Property Custodian, either/or (1) that the proceeds of the transactions, resulting in the debt sought to be collected, should be specifically traced into the 'money or other property held by the Custodian,' or (2) that there should exist some executory contract of purchase or sale directly affecting the money or property, so that it could immediately be seized under some process like a writ of replevin, or (3) that there should be a specific lien upon the money or property such as a vendor's lien, a lien created by pledge or mortgage, whether specific or equitable, or some kind of statutory lien, or (4) that the contract between the plaintiffs-appellants and the defendant-appellee, the Deutsche Bank, placed some limitation upon the disposition which the said Deutsche Bank might make of the borrowed money after it was delivered to said Deutsche Bank."

This assignment, strictly speaking, is argumentative. It deals with elements which are involved in the main question whether the debt "arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States." The third assignment raised the point that the court erred in not holding that the right of the Banco Mexicano to obtain a judgment in the State of New York against the Deutsche Bank was "a remedy which gave such security for said debt" that it had the effect of making the debt arise "with ref-

erence to the money or other property held by the Custodian." The remaining assignments of error raised in varying forms the points substantially covered by the first three assignments.

ARGUMENT.

I.

The meaning of Section 9, sub-section (e) of the Trading with the Enemy Act.

Under the Trading with the Enemy Act as originally enacted on October 6, 1917 (40 Stat., 411), and as amended by the Deficiency Appropriation Act, approved July 11, 1919 (41 Stat., 35), "any person not an enemy or ally of enemy" to whom any debt was owing by "an enemy or ally of enemy" could, after having made the demand provided for in the Act, commence a suit in equity in the Supreme Court of the District of Columbia for the recovery of such indebtedness out of the property held by the Custodian.*

By the second paragraph of Section 9, which became in the amended Act of 1920 sub-section (f), it was provided that the property in the hands of the Custodian should "not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." Thus all creditors, whatever the nature of their pre-existing rights, were precluded from resorting to any other court or

*Only in case the claimant elected to sue in a District Court of the United States was he required to be a resident of the district in which suit was commenced. The Supreme Court of the District of Columbia, on the other hand, was (by the 1919 Amendment) opened to non-resident friendly aliens, who thus for the first time had access to a forum in which to prosecute their claims.

pursuing any other legal or equitable remedy by which they might, but for the Act, have collected their claims out of the property. The Act as amended in 1919, contained no limitation of the right to collect a debt, based upon the manner in which it was secured, or the place where, or the circumstances under which, it had been incurred. Thus, an unsecured debt, incurred in a foreign country in a transaction having no relation to this country or to the property in the hands of the Alien Property Custodian, could (by virtue of the 1919 amendment) have been collected by a non-resident friendly alien.

Before the amendment of 1920, therefore, a very liberal policy was in effect in favor of all non-resident friendly aliens; and the Federal government pursuant thereto waived its prerogative of sovereignty by permitting itself to be sued, not only by its own citizens, but also by non-resident friendly aliens, upon unsecured debts of alien enemies whose property was in its hands. The statute (41 Stat., 35) embodying this policy created a much enlarged jurisdiction in the Supreme Court of the District of Columbia.

The amending act approved June 5, 1920, made several changes and for purposes of clearness subdivided the section into sub-sections "(a)," "(b)," "(c)," "(d)," "(e)," "(f)," and "(g)." Verbal changes were made in sub-section "(a)" which it is not necessary to notice here. They effected no change in the provisions of the part of the Act by which a claimant could recover only (1) where he had an "interest, right, or title" in the property held by the

Custodian, or (2) where a debt was owing to him "from an enemy or ally of enemy" owning such property. But the right to assert such claims in suits in equity was qualified by the conditions provided for in sub-section (e) of the amended act. We repeat that sub-section:

"(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and *as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.*" (Italics ours.)

The first of the three cases thus provided for is not pertinent because the Republic of Mexico was not "associated with the United States in the prosecution of the war." The second condition is fulfilled because the debt on which this action was based was owing to the claimant prior to October 6, 1917, to-wit, on December 15, 1916.

The present controversy arises concerning the proper interpretation of the third condition provided for in sub-section (e).

(A) The reasonable meaning of sub-section (e).

The description in sub-section (e) of a debt as one which "arose with reference to the money or other property," from the legal standpoint, and as legal phraseology is usually interpreted, is without definite significance. It is inartificial and untechnical. Even the word "arose" is unusual, a debt being usually described as having been "incurred" or "assumed"; and if specific security for a debt were intended to be described, the apt words would be "secured by money or other property," and not that it "arose with reference to" such money or property. But passing the use of unusual and inappropriate words as being chiefly important to show carelessness from the standpoint of legal draftsmanship, it is clear that in no sense either etymologically or grammatically does the description that a debt "arose with reference to the money or other property," convey the idea of a definite legal relation, recognized in our system of law, of the debt to the "money or other property." The words are merely those of general description. If it had been intended to connote accepted legal concepts, appropriate language could easily have been selected, as for instance as follows viz:

"That any person * * * claiming any interest, right or title in any money or other property, * * * or to whom any debt may be owing, *secured by a specific legal or equitable lien upon, or by a claim to or in, such interest, right or title*, * * * may file with the said custodian a notice of his claim under oath * * *."

Such a provision would include all cases where by reason of the legal effect of the transaction, the property could be pursued for the satisfaction of the debt in a proceeding *quasi in rem* based on a legal or equitable title, or upon a right of possession or a lien. The fact that such unambiguous language was not used is cogent testimony that Congress had no intention of expressing any recognized legal relation. Some other meaning, therefore, must be sought for the words.

The Standard Dictionary describes the words "with reference to" as meaning "the state of being referred or related." No definite or conclusive legal concept is implied in those words. In a colloquial, business, etymological and grammatical sense, there are many cases where it may with accuracy be said that a debt has been incurred with reference to certain money or property, as, for instance, where by the ordinary processes of the courts the indebtedness could be collected out of such money or property belonging to the debtor. With equal accuracy the same language might be applied to a case where the creditor expected that a debt would, in the ordinary and current course of business, be paid out of money or property which was being employed in the business in connection with which the debt was incurred, and where the creditor relied on the continuing availability of such money or property as the basis of the credit. In other words, it is reasonable to look upon "with reference to" as equivalent to "with an eye toward."

The existing if inchoate right of the Banco Mexicano (which we shall show in sub-point C, *post*, p. 23, existed) to sue upon the debt of the Deutsche Bank in the courts of the State of New York, where the loan was made and was payable, was a potential or executory remedy which needed only the presence in that jurisdiction of property belonging to the Deutsche Bank, to convert it into an effective legal security; and such security was actually available to the Banco Mexicano, because from the time of the making of the loan and until the money and the property of the Deutsche Bank had been taken over by the Government, the Deutsche Bank, if war had not ensued, would have paid the debt "in the ordinary and usual course of business which it [*i. e.*, the Deutsche Bank] was then carrying on in this country and particularly in the City of New York"; and it "continuously kept in the United States sufficient funds and property over and above what was necessary to pay and discharge all other claims and debts of every kind, to repay said loan in American gold dollars with interest at the rate of 5% from December 15, 1916, and said funds and securities were kept in the United States for the express purpose and with the intention by the use thereof, of repaying said loan when the same fell due" (Bill, par. 8; Rec., p. 4). It is not a violent assumption that it was the very existence of the money and property in this country, and, therefore, the likelihood of the payment of the debt, that were the inducements for the loan and created the credit of the Deutsche Bank on which the Banco Mexicano relied. In a very prac-

tical sense, under the foregoing circumstances, therefore, the debt was incurred with reference to the money or property of the Deutsche Bank which came into the hands of the Custodian.

(3) The interpretation contended for by the Government would disturb existing legal rights and remedies and should therefore be avoided.

The Government is practically forced into the position of claiming that debts do not arise "with reference to the money or other property" except (i) where proceeds of a sale can be traced into the property, or (ii) where a contract for the purchase or sale of specific property has been made and there can be some remedy for compelling its delivery, as in a suit for specific performance, or (iii) where there is some kind of specific lien, legal or equitable, upon the property, or (iv) where title is based on physical identity and there may be recovery of possession as, for instance, by writ of replevin. But it is obvious that if the debt referred to in sub-section (e) of Section 9 is confined to such cases, an intention must be attributed to Congress to destroy existing remedies under laws of the several States, where the property could, before the Act, have been reached in their courts in satisfaction of the debt upon judgment and execution. (See sub-point C, *post*, p. 23.) Such an intention is not reasonably to be inferred from the language of sub-section (e), because its language lacks the precision apt to express such a radical disturbance of rights and remedies. Moreover, such a purpose would be inconsistent with the

liberal policy inaugurated by the general provisions of the original Act as amended in 1919 (41 Stat., 35), to which we have referred. The remedies afforded by those provisions were broader than those which would have been open to the parties if war had not occurred; for they gave to foreign creditors a right to sue in equity upon a debt—a cause of action usually cognizable only at law—in the Supreme Court of the District of Columbia, even though both the creditor and the debtor were non-resident aliens, and the entire transaction from which the indebtedness resulted was consummated, and the loan was payable, in a foreign country. Thus, a Swedish iron merchant who had sold in Germany a consignment of iron ore, to be delivered to a German steel company in Germany and to be paid for there, could have successfully maintained a suit in equity in the Supreme Court of the District of Columbia for the purchase price, and on obtaining judgment could have satisfied it out of money or property of the German steel company in the hands of the Alien Property Custodian, even though (1) the entire transaction had been completed and the iron delivered in Germany, (2) all the parties were non-residents and non-citizens of the United States and the debtor was an alien enemy, and (3), except for the provisions of Section 9, neither the Federal nor the State courts would have had jurisdiction, either of the parties or of the subject-matter.

In the absence of some purpose clearly appearing from the language of the Act itself or from its legislative history, there is a strong presumption that

Congress did not intend by using such ambiguous language as that employed in sub-section (e), Section 9, of the Act of 1920, not only completely to reverse the liberal policy of the earlier Act, but also to deprive creditors of the remedies which they would otherwise have had for the collection of their debts in both the State and the Federal courts. (See *Kohn v. Kohn, Inc.*, 264 Fed. Rep., 253, 255; *Fischer v. Palmer*, 259 Fed. Rep., 355.) By sub-section (f) of Section 9 of the Act, property in the hands of the Custodian was to continue to be free from "lien, attachment, garnishment, trustee process, or execution" and was not to be subject to "any order or decree of any court" (41 Stat., 980). Unless sub-section (e) is interpreted in accordance with our contention, the prohibition of sub-section (f) results in what is in the nature of confiscation, and that, as we point out in sub-point F, *post*, p. 32, is to be avoided. If, however, the elastic language of sub-section (e) is interpreted so as to extend to the allowance of claims which could, except for the passage of the Act, have been prosecuted to judgment in the courts of one of the States and have been satisfied out of the property found in such State, we avoid a violent disturbance of property rights and existing remedies, and there would be excluded from the benefit of the Act only those persons having no business or residence connection with this country and possessing no specific claim to or lien upon the money or property in the hands of the Custodian.

(C) Provisions of State and Federal law.

In view of the foregoing considerations, it is proper to make a more ample and specific exposition of the provisions for the collection of debts in the State and Federal courts before the amendment of 1920.

(1) The New York statutory law is, of course, within the judicial notice of the Federal courts (*Moore v. Pywell*, 29 App. D. C., 312, 324; *Cheever v. Wilson*, 9 Wall., 108, 121).

Before the Civil Practice Act of New York went into effect on October 1, 1921, the subject of jurisdiction of the New York courts was covered by Section 1780 of the Code of Civil Procedure. The provisions of that section are now, in substantially the same form, embodied in Section 47 of the General Corporation Law of New York.

Section 1780 of the Code of Civil Procedure was in effect at the time when the debt of the Deutsche Bank was incurred and became due, and down to the date of the amendment of Section 9 of the Trading with the Enemy Act in 1920. It provided that an action might be maintained by one foreign corporation against another foreign corporation, or by a non-resident individual, in the following cases, viz:

“(1) Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.

“(2) Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

“(3) Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

“(4) Where a foreign corporation* is doing business within this state.”

Under this section, the Supreme Court of the State of New York would have had jurisdiction to entertain a suit by the Banco Mexicano against the Deutsche Bank for the collection of its note if it had not been paid at maturity, because the following bases of such jurisdiction existed, viz: (a) there was a “breach of a contract made within the state,” (b) “the cause of action arose within the state,” and (c) the Deutsche Bank was “doing business within this State.”

Furthermore, under Sections 635 and 636 of the Code of Civil Procedure, now embodied in Sections 902 and 903 of the New York Civil Practice Act, in an action for a breach of contract a plaintiff† might have obtained a writ of attachment against a foreign corporation or a non-resident individual, and, by Section 708 of the Code of Civil Procedure, now embodied in Section 969 of the New York Civil Practice Act, a judgment when obtained in such action could have been satisfied out of the attached property.

*This means the defendant foreign corporation: *United States Asphalt Refining Co. v. Comptoir National d'Escompte de Paris*, 166 App. Div. (N. Y.) 64, aff'd without opinion, 221 N. Y., 540.

†It matters not that the plaintiff also is a non-resident or a foreign corporation: *Bridges v. Wade*, 110 App. Div. (N. Y.), 106; *Lukens Iron & Steel Co. v. Payne*, 13 App. Div. (N. Y.), 11.

Thus, before the passage of the Trading with the Enemy Act in 1917, there would have been a complete remedy in New York State by which, under the circumstances of this case, the Banco Mexicano could have sued the Deutsche Bank, could have attached its property (of which there was an ample amount, Bill, par. 8, Rec., p. 4), and could have collected a judgment out of such property; or, it could have proceeded without attachment and have satisfied a judgment when obtained by execution levied upon the property of the Deutsche Bank found within the State.

(Note: By Section 9 of the Act of 1917, as amended by the Act of July 11, 1919, *supra*, non-resident alien individuals and corporations were accorded broader rights even than they then enjoyed under the laws of New York, in that they could collect their indebtedness out of the property of non-resident alien enemies in the hands of the Custodian, wherever and however it arose, and whatever its nature.)

(2) While we have not made a detailed examination of the statutes of the several States, we believe it is not too much to say that provisions similar to those in New York are in effect in most of the code States throughout the country, as well as in some of those States which adhere to common law practice.

(3) The jurisdiction of the Federal courts before the passage of the Trading with the Enemy Act is also pertinent because, by contrast, it shows the liberality of the policy of our Government embodied in the Trading with the Enemy Act. The rights and rem-

edies enjoyed by non-residents in the Federal courts before the passage of the Act, were far more restricted than under the laws of New York. For the judicial power of the Federal courts under Section 2 of Article III of the Federal Constitution does not extend to suits where both the plaintiff and the defendant are aliens; and that is so even if the cause of action arises within the United States or the defendant has property within the United States. (See *Gage v. Riverside Trust Co.*, 156 Fed. Rep., 1002, 1007, appeal dismissed, 218 U. S., 690; see also cases cited in 4 Fed. Stat. Ann. (2d Ed.), p. 973).

(D) The intention of Congress was to embrace by the provisions of sub-section (e) cases other than those where there was a definite legal "interest, right, or title" in the seized property.

We must, of course, find some sensible meaning for the phrase "arose with reference to the money or other property." Both the counsel for the Government and the Court of Appeals have felt the pressure of this canon of interpretation, and they have attempted to meet its requirements. But in doing so, as we have pointed out above, they find themselves logically forced to maintain that a debt which "arose with reference to the money or other property" must have been a debt which was related to such money or property in such a way that it could be satisfied by pursuing a right in the nature of a right *in rem* to, or a lien upon, the seized property. For illustration, we may repeat some cases of a debt of that kind, viz:

(1) Where the proceeds of the transaction resulting in the debt are actually traceable into the money or other property held by the Custodian so that under ordinary rules of law the money or property may be reached by a creditor; or (2) where the money or property is so affected by an executory contract of purchase or sale that it may be obtained in a suit for specific performance or seized under some process like a writ of *replevin*; or (3) where there is a specific lien upon the money or property, such as that existing in favor of a vendor or by reason of a pledge or mortgage, or by force of a statute or rule of law or equity; or (4) where by agreement the debtor is restricted in the disposition which he is permitted to make of the specific borrowed money so that equity would permit its recovery.

Perhaps we have not covered all the cases where a debt might be incurred under circumstances which would give to the creditor a definite legal right to resort to the property, but the foregoing cases are sufficient for purposes of argument. The question arises as to whether Congress intended by the limitations of sub-section (e) to imply that only in such cases as those mentioned above, a debt arises "with reference to the money or other property held by the Custodian." An analysis of the provisions of sub-section (a) will aid in enabling us to answer that question.

Sub-section (a) of Section 9 (unchanged in this respect by either of the amending acts of 1919 or 1920) allows a remedy against the property in the

hands of the Alien Property Custodian in two cases, viz:

Case 1: To any person (not an enemy or ally of enemy) "claiming any interest, right, or title in" the seized property; and

Case 2: To any person (not an enemy or ally of enemy) "to whom any debt may be owing from an enemy or ally of enemy whose property" has been seized.

If the words "arose with reference to" in sub-section (e) imply a definite legal relation such as any of those enumerated above, it necessarily results that in legal effect they provide for precisely the same cases as those already provided for by sub-section (a), to-wit, those where a person claims an "interest, right, or title in" the seized property. A reference to the examples mentioned in the opinion of the Court of Appeals will make this statement still clearer.

The Court said (Rec., p. 93):

"There are conceivable instances where in a plain case of debt, without title or lien against the money or property, the debt might arise with reference to the money or other property taken over by the Custodian. For example, if the money seized was identically the same money which furnished the basis of the debt, or if the money had been loaned and used for the specific purpose of purchasing property which had been seized by the Custodian, the debt might have such reference to the money or property as to permit of suit by an alien. But that is not the case."

The first case mentioned by the Court is: where "the money seized was identically the same money which furnished the basis of the debt." But in such a case the claimant would clearly have, under sub-section (a), an "interest" in, if not a "title" to, the identical money, without reference to the provisions of sub-section (e). Why, therefore, provide for such a limitation in that sub-section?

The other example mentioned by the Court is where "the money had been loaned and used for the specific purpose of purchasing property which had been seized by the Custodian." But in that case the implied trust from the improper use of the money, and the resulting claim to the property, would clearly be an "interest" in or "right" to the property cognizable in equity and sufficiently provided for in sub-section (a) (Case 1, *ante*, page 28). Why then repeat it in sub-section (e) by way of limitation upon the cases in which the property could be resorted to for the payment of a debt?

All the other cases that we have enumerated above similarly fall within the category of claims based upon an "interest, right, or title in" the property. Thus (1) if the proceeds of a transaction could be specifically traced into the property seized, the claim to recover the property would constitute both an "interest" in it and a "right" to it; or (2) if a case existed where a writ of *replevin* could be issued to take possession of the property, such writ would necessarily be predicated upon a "title" to the property; or (3) if there existed a vendor's lien or a lien created by pledge, by mortgage, by statute, or by rule of

law or equity, there would be an "interest" in the property itself; or (4) if some express limitation upon the use of the property was imposed by the owner there might spring therefrom a "right" in equity to the property itself.

Thus, in any conceivable case where a remedy exists either in law or in equity, to proceed against and secure possession of the money or property itself, it has been provided for in the first part of sub-section (a), which permits a person "claiming any interest, right, or title in" the seized property to maintain a suit in equity for its recovery. If we are right in this conclusion, we repeat, how can it be reasonably said that by sub-section (e) Congress intended to limit cases where debts could be collected out of the seized property to those where under sub-section (a) such property could have been resorted to? Unless a result different from that was intended by the provisions of sub-section (e), the purpose of Congress would have been accomplished by simply eliminating from the statute all reference to debts, and extending a remedy against the seized property to those persons only who claimed "any interest, right, or title" therein.

It follows from these considerations that when Congress referred to debts which "arose with reference to the money or other property held" by the Custodian, the intention was to cover transactions other than those resulting in a claimant having a definite legal "interest, right, or title in" the seized property; and we have suggested in sub-point A, *ante*, page 17, what kind of transactions Congress must have intended to reach.

(E) Sub-section (e) vested in a court of equity the power to determine in each case whether a debt "arose with reference to the money or other property held by the Alien Property Custodian."

The remedy provided for by sub-section (a) of Section 9 was "a suit in equity." The technical nature of the cause of action was ignored in providing the remedy; and actions on debt, or in replevin, for instance, although usually cognizable in a court of law, were to be tried in a court of equity. This fact is another evidence of the liberal policy which led to the enactment of the law, and it is not a violent assumption that Congress intended to commit to a court of equity not only all issues at law or in equity, but also the broad question of fact as to whether a debt "arose with reference to the money or other property" held by the Custodian.

It is easy to see why "claimants other than citizens of the United States" [sub-section (e)] should be discriminated against in respect of remedies upon debts not resulting from transactions in this country, or upon debts payable in a foreign country. But where, as in the case at bar, the debtor had been continuously engaged in the banking business in this country, had kept funds sufficient to pay and for the purpose of paying the debt, and where the debt was to be paid in American currency in the City of New York, and the creditor could have sued upon the debt in the courts of New York and levied on and applied to its payment

property remaining here, *the entire transaction was American*—it was *not*, in the phrase of the Assistant Attorney General who drafted the amendment of 1920, “*of non-American origin*”; and there was no reasonable ground to limit the meaning of the words used in sub-section (e) so narrowly as to prevent the Supreme Court of the District of Columbia, sitting in equity, from holding that a debt incurred under such circumstances “*arose with reference to the money or other property*” held by the Custodian.

(F) The statute should be interpreted so as to avoid the destruction of neutral rights and remedies, and a contravention of international law.

To interpret the statute in such a sense as to deprive a claimant of a remedy under the circumstances just mentioned would be to attribute to Congress an intention to do something in the nature of a confiscation of neutral property rights.

It is a fundamental rule of statutory construction that

“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country” (*Murray v. Schooner Charming Betsy*, 2 Cranch, 64, 118).*

*“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” *The Paquete Habana*, 175 U. S., 677, 700.

A temporary interference with a neutral's right to avail himself of his property rights constitutes a "forced loan," and it is stated without qualification in *Hyde on International Law* (1922), Vol. 2, Sec. 631, that "the United States itself has never exacted forced loans." *A fortiori*, to go further and permit the complete destruction of a neutral's right in enemy property without compensation, is contrary to justice and to the principles of international law. Professor Hyde further says (Section 633) that while neutral property may be seized, to do so where there is not a vital need and where compensation is not assured to the owners "would manifest an abuse of power." Furthermore, to interpret sub-section (e) in accordance with the theory of the Government and of the Court of Appeals, would be at variance with the policy of this government announced as long ago as 1833, that even in cases of conquest,

"that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated, and private rights annulled." (*United States v. Perchemann*, 7 Pet., 51, 87).

See also *Ex parte Boussmaker*, 13 Vesey, 71; 28 Yale Law Journal, 478 (March, 1919); 21 Columbia Law Review, 666 (November, 1921); Hague Convention of 1907, Arts. 1-5.

In *United States v. The Peggy*, 1 Cranch, 103, Chief Justice MARSHALL said that while the independent political discretion of a government could

not be questioned, its exercise should never collaterally prejudice vested rights. See also *United States v. Arredondo*, 6 Peters, 691, 710. And in *MacLeod v. United States*, 229 U. S., 416, 434, the Supreme Court remarked that the purpose of the Government "to act within the limitations of international law" is inherent as a principle of the Constitution.

(G) The legislative history of the Act of June 5, 1920.

Our view of the proper interpretation of subsection (e) is confirmed by the legislative history of the bill which became the Amending Act of June 5, 1920. This history is a proper subject for the consideration of this court (*United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318, and *Duplex Printing Press Company v. Deering*, 254 U. S., 443, 474).

On Tuesday, May 25, 1920, the Committee on Interstate and Foreign Commerce of the House of Representatives held a hearing on the bill. Mr. Boggs, the Special Assistant to the Attorney General in charge of the bill, made a statement to the Committee concerning its several features. (See printed document, Rec., pp. 12-75). The statement covers pages 13-43 and pages 71-72, being record of hearing on H. R. 14208, Sixty-sixth Congress, Second Session. Mr. Boggs stated* that the Attorney

* He prefaced his remarks by saying:

"The next clause [in the bill] is 'and as to claimants other than citizens of the United States, unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder'" (Rec., p. 31).

This phraseology is exactly that used in sub-section (e) as afterwards enacted.

General's office was responsible for certain portions of the bill and then proceeded to explain the subsection which was afterwards designated "(e)." *He gave it the exact meaning for which we now contend, and used an illustration which is exactly like the case presented by this record.* He said:

"But in the case of a citizen of France or Great Britain, who has a just debt that originated with reference to the property which is over here, in other words, where a German concern had a branch house here and that branch house here created a debt which is owed to a citizen of one of these friendly nations, there would seem to be no reason in justice or good morals why that property here should not pay it subject to the limitation that it must have been a debt that accrued prior to the enactment of the trading with the enemy act" (Rec., p. 31; [p. 20 of the House document]).

Mr. Boggs also stated that remedies to collect their debts should not be opened to "enemy creditors," and then he added:

"Therefore, it is our opinion that debts of non-American origin should be collected by other means than out of this property here" (ibid).

Thus, the Special Assistant to the Attorney General elucidates the meaning of the words "with reference to" by describing a concrete case in all essential particulars precisely like that described in the Bill of Complaint in the case at bar; for the Deutsche Bank was a "German concern" which "had a branch

house here and that branch house here created a debt which is owed to a citizen of one of these friendly nations" (*i. e.*, the Republic of Mexico). In the case at bar, the facts had a more pronounced American aspect because the "German concern" kept money here for the purpose of paying the debt, which was payable here in gold dollars and could have been collected in the courts of this country if the property of the alien enemy had not been seized.

The case described by Mr. Boggs is that of a simple unsecured indebtedness; he makes no suggestion in his remarks that there was an intention by sub-section (e) to define cases where definite legal claims in the nature of liens or titles could be asserted.

The amended bill containing sub-section (e) was dealt with in the report (No. 1089, Sixty-sixth Congress, Second Session) of the Committee on Interstate and Foreign Commerce. That report does not contain any suggestion that Congress intended to make radical changes in the rights and remedies of friendly aliens as they had been created by the act previously in force. On the contrary, the purpose of the bill was stated to be "to facilitate the return on the part of the Alien Property Custodian" of money or property in his possession (Rec., p. 77). The radical results now claimed for sub-section (e) were not hinted at in the report or in the detailed statement in two lengthy letters (Rec., p. 79 and p. 83) of the Attorney General dated March 31, 1920,

and May 11, 1920, which were made a part of the report.*

But the report did contain the significant statement that it was not the purpose "to confiscate this property. * * * It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our Government's claims against such belligerent. Such practice is contrary to the spirit of international law throughout the world" (Rec., p. 78).

Finally, in the annual report of the Attorney General for the year 1920 (p. 141 of the bound volume for that year) he refers to some of the changes in the law effected by the Amended Act of 1920. But he does not mention the radical result which the government now claims to have been brought about by the provisions of sub-section (e).

It cannot, of course, be claimed for the proceedings before the Congressional Committee that they

*Note: The following statements are made in the communications of the Attorney-General, viz: (1) "Sub-sections (d) and (e) contain the same general provisions relative to the effect of Section 9 which were in Section 9 as originally enacted" (Rec., p. 80); (2) "The Second paragraph of Section 9 as now in force is re-enacted as sub-section (e) of the proposed bill. The third paragraph of said section as now in force is re-enacted as sub-section (f) of the proposed bill" (Rec., p. 83) and (3) "Sub-sections (e) and (f) are contained in the act as it now exists, and no change is made in respect to them, except the prefixing of the letters which designate them" (Rec., p. 84).

The references in these quoted statements are confusing, owing probably to changes at some time of the lettering of the clauses of the bill. The fact is that that portion of sub-section (e) with which we are concerned was not contained in the original bill; it was the second paragraph of Section 9 which was re-enacted, and not as sub-section (e), but as sub-section (f) of the amended bill. The third paragraph of the section "as now in force" was re-enacted, not as sub-section (f) of the proposed bill, but as sub-section (g) of the proposed bill. Sub-section (e) as enacted in the amended bill, was entirely new, and particularly that part of it with which we are concerned.

are conclusive. But the comments of the Attorney General in the presence of the committee itself, and the fact that when those comments were made the proposed sub-section (e) was in precisely the form in which it was afterwards enacted, afford striking contemporaneous evidence of (i) the abuse which it was sought to correct, (ii) the purpose which it was sought to accomplish, and (iii) that that purpose did not require that sub-section (e) be given the meaning now contended for by the Government.

We assume that it is not necessary to make an extended argument as to the propriety of the admission of the report of the Committee and the record of the hearing at which the bill was considered. It is a part of the record before this court. It is the kind of public record or document of which the court may take judicial notice, and its reception as a part of the record of the trial was proper. (*Duplex Printing Press Co. v. Deering*, 254 U. S., 443, 474; *Lindsley v. National Carbonic Gas Company*, 220 U. S., 61, 79; *Lewis Publishing Company v. Morgan*, 229 U. S., 288; *Church of the Holy Trinity v. United States*, 143 U. S., 457, 464; *United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318.)

In *Duplex Printing Press Co. v. Deering*, *supra*, the Supreme Court stated that

“reports of committees of the House or Senate
* * * may be regarded as an exposition
of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns v. United States*, 194 U. S., 486, 495. And this has been extended to include explanatory state-

ments in the nature of a supplemental report made by the committee member in charge of a bill in course of passage."

See *United States v. Coca-Cola Co.*, 241 U. S., 265, 281, and *United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318. The same principle applies to a sponsor of a bill who is the head of one of the governmental departments, for as was said in *United States v. Moore*, 95 U. S., 760, 763:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

See also, as to recommendations by the Attorney General, *Perovich v. Perry*, 167 Fed., 789, 791 (C. C. A., 9th Circuit); *Johnson v. Southern Pacific Co.*, 196 U. S., 1, 19.

The rule as to the admissibility of public documents for the consideration of the court applies in cases where an issue of law is presented on demurrer to a bill, or upon a motion to dismiss a bill, which is substantially the same thing (*Lindsley v. National Carbonic Gas Co.*, *supra*; *Lewis Publishing Co. v. Morgan*, *supra*; *Church of the Holy Trinity v. U. S.*, *supra*; *Ingersoll-Rand Co. v. United States Shipping Board Emergency Fleet Corporation*, 195 App. Div. [N. Y.], 838, 840).

(H) The rule requiring the strict construction of statutes authorizing suits against the United States ought not to have been applied by the Court below.

The Court below said (Rec., p. 93):

“This is in effect a suit against the United States. The rule is well established that, when the United States permits itself to be sued in its own courts, the terms of the permission must be strictly followed, and the suitor’s cause must come within the government’s consent.”

It is submitted that this doctrine has no application to a suit in which the United States is a mere stakeholder. The United States took no beneficial interest in seized German property. It took the property for the benefit of, or in trust for, such creditors of German citizens as should prove their claims. The real party defendant is the Deutsche Bank.

The case, therefore, becomes an apt one for the application, *mutatis mutandis*, of the principle of *United States v. Beebe*, 127 U. S., 338, 347, where LAMAR, J., writing for a unanimous court said:

“We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone.”

II.

The decree of the Court of Appeals should be reversed with costs, and the cause remanded to the Supreme Court of the District of Columbia with directions to enter a decree in favor of the plaintiffs in accordance with the prayer of the Bill of Complaint.

December 3, 1923.

HENRY W. TAFT,
Counsel for Appellants-Petitioners.

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dollars on June 15, 1917. It bore interest at the rate of five per cent per annum. (R. p. 3 and 4.) The proceeds of the loan were deposited forthwith by the German Bank with the Guaranty Trust Company of New York to the credit of the general bank account which the German Bank then had with the Trust Company.

War was declared between the United States and Germany on April 6, 1917. (R. p. 4.)

Congress passed an act known as the "Trading with the Enemy Act," which was approved and went into effect October 6, 1917. (40 Stat. 411.) At some time after the passage of this act the Alien Property Custodian seized all property of the German Bank then in the United States, including the balance on deposit with the Guaranty Trust Company of New York. On May 27, 1920, the Mexican Bank made an application to the President of the United States for the payment of the debt of the German Bank to the Mexican Bank out of funds and other securities seized by the Custodian and held by the Custodian or the Treasurer of the United States. (R. p. 5.)

PROCEEDINGS IN THE LOWER COURTS.

The case was disposed of in the Supreme Court of the District of Columbia on a motion to dismiss the bill of complaint, which motion was sustained on May 25, 1922. (R. p. 85 and 86.) The motion was based upon two grounds (R. p. 8):

- (1) That plaintiffs' are claimants other than citizens of the United States, and that the

debt of which the plaintiffs are seeking to recover did not arise with reference to money or any other property held by the Alien Property Custodian or by the Treasurer of the United States, under and pursuant to the terms and provisions of the Trading with the Enemy Act, as amended.

(2) That the bill does not state a case for equitable relief under Section 9 of the Trading with the Enemy Act, as amended.

On appeal to the Court of Appeals of the District of Columbia the decree of the court below was affirmed with costs. (R. p. 94.)

The case now comes into this court on appeal from a final decree of the Court of Appeals of the District of Columbia affirming the decree of the District Court dismissing the bill of complaint. Appellants also filed a petition for a writ of certiorari to review the decision of the Court of Appeals of the District of Columbia, which petition has, by action of this court, been postponed, so that the application for the writ of certiorari and the case on appeal might be heard together.

TRADING WITH THE ENEMY ACT AND AMENDMENTS.

The statutory provisions enacted by Congress relating to the seizure, control, and disposition of enemy owned property which are pertinent to a discussion of this case are as follows:

Be it enacted * * *

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the

salary (not to exceed \$5,000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy which may be paid, conveyed, transferred, assigned or delivered to said Custodian under the provisions of this act; and to hold, administer, and account for the same under the general direction of the President and as provided in this act. (Trading with the Enemy Act, approved October 6, 1917, 40 Stat. 411.)

If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this act. (Sec. 7, as amended November 4, 1918, 40 Stat. 1020.)

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right,

or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the

expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or the Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (As amended June 5, 1920, 41 Stat. 977.)

Subsection (e) of Section 9, as amended June 5, 1920 (41 Stat. 977), contains the language upon the construction of which the instant case depends. It is as follows:

No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, *and as to claimants other than citizens of the United States unless it arose with reference to money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.* (Italics supplied.)

QUESTION INVOLVED.

Did the debt of appellants arise with reference to the money or other property of the German Bank in the possession of the Alien Property Custodian and Treasurer of the United States? If the debt of the appellants did not arise with reference to this specific money held by the Alien Property Custodian or the Treasurer of the United States, within the meaning of Subsection (e) supra, it is the duty of the Custodian to defend his possession until Congress determines what disposition it will make of the property.

ARGUMENT.

No question is raised as to the power of the United States Government, acting through the Alien Property Custodian, to seize the property of the German Bank found within the borders of the United States while at war with Germany. When the funds of the German Bank on deposit with the Guaranty Trust Company of New York were seized there was nothing to indicate any connection between the property so seized and the claim of the Mexican Bank. The Guaranty Trust Company simply paid to the Alien Property Custodian the amount in its possession standing to the credit of the German Bank.

When the appellants, on May 27, 1920, made demand that the debt due the Mexican Bank be paid out of the funds and securities seized by the Alien Property Custodian it was refused because Congress had not provided for the collection of a debt out of the property of an alien enemy unless that debt arose with reference to the money or other property held by the Alien Property Custodian. There is nothing in the averments of the bill of complaint to identify any part of the property seized by the Alien Property Custodian or held by him with the debt due the Mexican Bank. On the contrary, it appears affirmatively from the bill of complaint filed by appellants that the money loaned to the German Bank was deposited to its credit in its general account months before the United States and Germany entered war. No one claims that the money loaned by the Mexican Bank December 15, 1916, and deposited by the German

Bank in the Guaranty Trust Company of New York was identified as a special deposit. The money so borrowed by the German Bank was used by it for any purpose for which need arose. No limitation was imposed upon its use. The German Bank had absolute freedom in reference to the money borrowed and was under no obligation except to repay the loan when due.

It is clear from the bill here filed that the Mexican Bank loaned \$500,000 to the German Bank for six months; that the German Bank became the debtor of the Mexican Bank; that the German Bank deposited the money received from this loan in its general account in the Guaranty Trust Company, and that the Guaranty Trust Company then became the debtor of the German Bank by reason of the uncontroverted rule of law that a general deposit creates a debtor and creditor relationship. Immediately upon making this deposit the money became the property of the Guaranty Trust Company, and, in return for the money, the Guaranty Trust Company assumed the obligation to pay to the German Bank \$500,000. The Guaranty Trust Company had absolute and unencumbered title to this money, and it in turn owed the debt. The Guaranty Trust Company paid to the Alien Property Custodian its own money in discharge of the obligation it owed to the German Bank.

The debt created December 15, 1916, which became due June 15, 1917, differs in no respect

from any other debt owing to and owned by friendly aliens. The fact that the United States now has in its possession money or other property belonging to the debtor is not sufficient to justify the allowance and payment of the claim of the Mexican Bank.

I.

Statutory limitations upon the right to recover a mere debt.

Under Section 9 (a), any person not an enemy or ally of enemy, to whom any debt may be owing from an enemy, may file a claim and the President may order payment to said claimant of money or other property of the debtor held by the Alien Property Custodian; and a claimant may also institute a suit in equity to establish a debt so claimed, which, if established, the court is required to order paid from money or other property of the debtor held by the Custodian. Under the general language of this section of the amendment of June 5, 1920, any person not an enemy might enforce the payment of a debt from the property of the debtor in the possession of the Custodian.

Congress, however, by Subsection (e) of the amendment of June 5, 1920, placed a limitation upon the right to recover a mere debt, limiting that right to citizens of the United States, unless the debt "arose with reference to the money or other property held by the Alien Property Custodian." Subsection (a) is an enabling act granting certain remedies to certain parties, while Subsection (e) is

a limitation and restriction designed to cut down the provisions of Subsection (a). The contention of counsel for appellants that Subsection (e) is a mere duplication of the remedy provided for in Subsection (a) ought not to be sustained. Subsection (e) does not provide any remedy. It simply limits and restricts the remedy already provided by Subsection (a). Congress had the power to withhold from creditors not citizens of the United States the general right to recover payment of debts due such creditors from property of enemy debtors which had been legally seized.

It is neither unusual nor absurd for a sovereignty to give its own citizens rights and privileges which are denied to foreigners. The United States had the right to take the money of the Mexican Bank and it has the right to say when and by whom, if at all, such money may be resorted to for the payment of debts owed by the alien enemy whose property has been seized.

II.

The Remedy by attachment under the New York Statute does not bring the claim within the provisions of Subsection (e), Section 9, of the Act of June 5, 1920.

The appellants set forth in Paragraph 16 of the bill (R. p. 6) the fact that under the laws of the State of New York the funds and securities of the German Bank are subject to attachment and can be levied upon and seized and applied in satisfaction of a judgment in favor of the Mexican Bank for said loan and

interest and that appellants now have a cause of action against the German Bank on which they can now sue in the courts of general jurisdiction in the State of New York for the recovery of said debt and interest. They rely upon these facts to establish the debt due the Mexican Bank as one which arose with reference to the money held by the Alien Property Custodian.

The laws of New York providing for the recovery of a judgment and the collection thereof do not in any way tend to identify the debt with the property out of which satisfaction of a judgment may be enforced. Every creditor has the same remedy under these statutes, whether his debt arose with reference to the money out of which satisfaction is to be had or not. The limitation of said Subsection (e) placed upon claimants other than citizens of the United States would have no effect whatever if this contention with reference to the New York statutes should be sustained.

This Act of Congress was not intended to deprive creditors of their remedies for the collection of debts under the State and Federal statutes, but the right of a sovereign while at war to seize and hold the property of its enemies is not affected or diminished by the fact that such enemies may have foreign nonenemy creditors. There was no more disturbance of property rights and existing remedies than was incident to the state of war which made proper the enactment of the original statute approved October 6,

1917, providing for the seizure of enemy-owned property.

Congress intended to exclude foreign creditors from asserting claims against money or property in the hands of the Custodian unless they could assert an interest, right, or title therein, or unless the debts sought to be satisfied arose with reference to money or other property held by the Custodian. This is a plain case of debtor and creditor between the German and Mexican Banks. The transaction has left no earmarks on any money or property in the possession of the Custodian. The limitation contained in Subsection (e) operates to deprive appellants of any right of action. The right of the United States to retain this property seized from an alien enemy is superior to any rights of creditors of that enemy.

III.

No policy of the United States to confiscate property of the enemy is involved.

Congress has not yet determined what shall be done with property of the enemy seized during the war. It is sufficient for the Alien Property Custodian to say that the property of enemies having been rightfully seized, it is his duty to hold it until Congress shall clearly direct when and to whom such property may be lawfully returned. The plaintiffs' case must come within the Act of Congress permitting suit to be brought against the Government. While Congress has never indicated an intention to confiscate the property of former enemies now in the

hands of the Alien Property Custodian, it has not, on the other hand, provided for the general return of such property.

IV.

Legislative history of Act of June 5, 1920.

The legislative history of the Act of June 5, 1920, need not be looked to to ascertain the legislative intent in this case, because the meaning of the statute is not obscure. The debt, under the language used by Congress, must have had some reference to the money or property held by the Custodian. In the present case it had none. Not a single fact distinguishes this debt from any other ordinary debt. The money was borrowed December 15, 1916, for six months. It became due June 15, 1917. No one had interfered in any way with the custody or use of the money. The property of the debtor was not seized by the United States until long after the debt became due. It is inconceivable that the German Bank borrowed the money and left it on deposit with the Guaranty Trust Company for the sole purpose of using it to pay the debt when due.

AUTHORITIES RELIED UPON.

The power of Congress to say when and by whom enemy property seized by the United States may be resorted to for the payment of debts owed by alien enemies was upheld in the case of *Nortz v. Miller and Seeliger* (opinion by Judge Knox in the District Court of the United States for the Southern District

of New York in December, 1921, 285 Fed. 778; affirmed 285 Fed. 781).

The language of Subsection (e) of Section 9 of the Amendment of June 5, 1920, was there under consideration.

The specific provisions of Subsection (e) must be given effect over the general provisions of Subsection (a) of the amendment.

Peck v. Jenness, 7 Howard, 612, 622.

Townsend v. Little, 109 U. S. 504.

The relation which exists between the Guaranty Trust Company and a general depositor like the German Bank is that of debtor and creditor.

Marine Bank v. Fulton Bank, 2 Wall. 252.

Thompson v. Riggs, 5 Wall. 663.

Bank of Republic v. Millard, 10 Wall. 152, 155.

Perry on Trusts, Fifth Ed. Sec. 128.

Story's Equity Jurisprudence, Sec. 1259.

Mr. Justice Miller, in *Marine Bank v. Fulton*, supra, at page 256, said:

All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter in consideration of the loan of the money and the right to use it for his own profit, agrees

to refund the same amount, or any part thereof, on demand.

When the money of the German Bank was received by the Guaranty Trust Company, its identity as a fund was lost. It became a part of the general mass of property of the Trust Company and the only relation between the Guaranty Trust Company and the Mexican Bank thereafter was that of debtor and creditor. (*School Trustees v. Kirwin*, 25 Ill. 77.)

CONCLUSION.

The case is summarized in the opinion of the Court of Appeals in two paragraphs which read as follows (289 Fed. 924, 926, 927):

It is clear from the averments of the bill that when the loan was made the German bank became the debtor of plaintiffs, and when the German bank in turn deposited the proceeds of the loan with the Guaranty Trust Company the company became the debtor of the German bank, hence, in each transaction the relation of debtor and creditor was established. It must also be conceded that the Mexican bank, the plaintiff in interest, is not a citizen of the United States. The case, therefore, turns upon the single proposition whether the debt arose with reference to the money or property seized by the Alien Property Custodian.

There is nothing to indicate that the contract between the two banks placed any limitation upon the disposition which the German bank might make of the borrowed

money after it was delivered to it. It was free to send the money out of the country, to deposit it to its credit in a bank, as was done, or use it in any manner that it might see fit. The transaction imposed no duty upon the German bank either contractual, moral, or by commercial custom, except to repay the loan when due according to its terms.

The appellants who are not citizens of the United States are not entitled to recover their debt out of the funds in the hands of the Alien Property Custodian because that debt did not arise with reference to any money held by the Alien Property Custodian or the Treasurer of the United States.

Respectfully submitted.

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